On or about June 4, 1920, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

E. D. BALL, *Acting Secretary of Agriculture.*

8360. Misbranding of Texas Wonder. U. S. * * * v. 141 Bottles of Drug Products. Tried by the court. Decree of condemnation and forfeiture. Product ordered released on bond. Appeal taken to the Circuit Court of Appeals for the Fifth Circuit. Decision by said Circuit Court of Appeals affirming the judgment of the lower court. (F. & D. No. 9377. I. S. No. 6265-r. S. No. C-983.)

On October 4, 1918, the United States attorney for the Southern District of Texas, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 141 bottles, represented as drug products, at Houston, Tex., alleging that the article had been shipped by E. W. Hall, St. Louis, Mo., on invoice dated September 21, 1918, and transported from the State of Missouri into the State of Texas, and charging misbranding in violation of the Food and Drugs Act, as amended. The article was labeled on the carton, "A Texas Wonder, Hall's Great Discovery, Contains 43% alcohol before diluted. 5% after diluted. The Texas Wonder! Hall's Great Discovery, for Kidney and Bladder Troubles, Diabetes, Weak and Lame Backs, Rheumatism, Gravel, Regulates Bladder Trouble in Children. One small bottle is 2 months' treatment. Price $1.25 per bottle. E. W. Hall, Sole Manufacturer, St. Louis, Mo." The circular accompanying the article contained the following: "Louis A. Portner * * * testified he began using the Texas Wonder for stone in the kidneys * * * and tuberculosis of the kidneys as diagnosed by his physicians * * *. He was still using the medicine with wonderful results, and his weight had increased."

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it consisted essentially of a solution of plant extractives including copaiba, rhubarb, turpentine, guaiac, and colchicin in alcohol and water.

It was alleged in the libel that said label on the carton and in the circular contained in each of the cartons, regarding the curative and therapeutic effect of said drug products or medicine, was false and fraudulent in that said drug or medicine contained no ingredient or combination of ingredients capable of producing the curative or therapeutic effects claimed for it as set forth by the printed matter on the said carton, and thereby the said products were misbranded in violation of the Food and Drugs Act, and its amendments.

On July 16, 1919, the case having been tried by the court without a jury, the issues were found in favor of the Government, as will more fully appear from the following opinion by the court (Hutcheson, *D. J.*):

This is a libel brought by the Government of the United States for condemnation of 141 bottles, more or less, of drug products under the Act of Congress approved June 30, 1906, as amended by the act of August 23, 1912, chapter 352, and the act of March 3, 1913, chapter 107.

The said 141 bottles contained the preparation known and described as "A Texas Wonder."

The libel charged that on the carton inclosing the drug products or medicines in said bottles was printed the following label: "A Texas Wonder, Hall's Great Discovery, Contains 43% alcohol before diluted. 5% after diluted. The Texas Wonder! Hall's Great Discovery, for Kidney and Bladder Troubles, Diabetes, Weak and Lame Backs, Rheumatism, Gravel, Regulates Bladder Trouble in Children. One small bottle is 2 months' treatment. Price $1.25 per bottle. E. W. Hall, Sole Manufacturer, St. Louis, Mo."

refers to bed wetting, indicates plainly that his use of the term is too broad, because it does not exclude other troubles than the one he claims to cure, and would be plainly calculated, therefore, to mislead.

I am therefore of the opinion that every claim made for the medicine on the carton, in the form adopted there, is false, and that a clear and undeniable case of misbranding has been made out. But it is not sufficient in a case of this kind to establish merely the falsity of the claim; it must also appear that this false claim was made fraudulently—that is, either the defendant knew it was false or without knowledge of its truth or falsity made the claim recklessly and without a firm and honest belief in its truth. This feature of the case has given me far more concern than the question of the misbranding itself.

It is clearly settled that a mere difference of medical opinion will not sustain a condemnation. Magnetic Healing Company *v.* McAnnulty, 187 U. S., 94.; U. S. *v.* Johnson, 221 U. S., 499. It is equally well settled, however, Seven Cases *v.* U. S., 239 U. S., 517, "that false and fraudulent representations may be made with respect to the curative effect of substance is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs, *but state of mind is itself a fact*, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have superior knowledge and may be held to good faith in their statements." Or, as was stated by Mr. Justice McKenna, in U. S. *against* New South Farm, 241 U. S., 71: "An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented, and hence does not serve the purpose." The defendant admits that he is not himself a physician, though many of his circulars and advertisements declare him to be "Dr. E. W. Hall," nor does he claim for himself any special medical skill or knowledge. He relies most largely upon the fact of the sales to thousands of purchasers, and the numerous and glowing testimonials about cures, which he no doubt received, as an evidence that he could not be guilty of fraud in the matter. But the slightest reflection upon the well-known fact that persons given to self-medication are credulous and partisan, and prone to deny nature credit for their recovery, and that on this well-known trait of human nature these compounders of specifics and nostrums build their business, deprives this claim of any weighty significance; because it will not do for a person who has been able to prey upon the credulity of a community to escape the consequences of his acts by the very success of his scheme. I think the matter has been excellently put by Judge Dickinson, in U. S. *against* American Laboratories, 222 Fed., 107: "The fact that there was a widely spread disposition among people to give credence to the statement because of a superstitious belief in its efficacy, or indeed such a reputation for the remedy itself as to make people prejudiced in its favor, would not diminish, but would increase, the guilt of him who sought to make money by false statements and fraudulent devices. It is difficult, and indeed practically impossible, to draw a line in the abstract other than a broad line between these two things. There would seem to be no other way of dealing with the subject than to submit to the common-sense judgment of a jury to find whether in a given case the acts of a defendant have been honest, however mistaken, or whether they have been false and fraudulent." Under this view of the matter, this court, sitting as a jury, can reach no reasonable conclusion other than that the defendant, whatever may have been the honesty or innocency of his attitude when the medicine was first put out, now knows, and knowing commits a fraud in his advertisements, that the medicine is not efficacious as a remedy in the form and manner under which it is advertised. It would be sufficient, in my judgment, to sustain the libel, for me to hold that the defendant did not know that his statements were false, but merely made them recklessly and without due regard for that fact. But I think the evidence establishes more, and leaves no doubt that the defendant is seeking by a broad and comprehensive claim for his medicine, to increase its sales, with an absolute knowledge on his part of the falsity of his advertisements, certainly as to a part of the matters claimed for it.

It is due the defendant, however, to say that the evidence establishes without serious dispute that the preparation contains in it no harmful or deleterious drug, nor is it, as compounded, deleterious when used in the manner prescribed. So that, while it is clear to my mind that the defendant has violated the statute by fraudulently misbranding his product, it is equally clear that he

That said label on said carton is false and fraudulent in that the drug or medicine contains no ingredient or combination of ingredients capable of producing the curative or therapeutic effects claimed for it, and that the said products are thereby misbranded in violation of law.

To this libel an answer and petition in intervention was filed by E. W. Hall, the person charged in the libel to be the proprietor and distributor of this medicine, claiming therein to be the owner of said property, and among other things pleading *res adjudicata* by reason of a verdict and judgment of "not guilty" in a suit entered and tried in the United States District Court for the Eastern District of Missouri, March term, 1915, of said court, in which the United States Government was plaintiff and the said E. W. Hall was defendant. The answer further denied the allegations in the libel and specifically declared that the medicine was not misbranded, for that it would in fact produce the curative and therapeutic effects when administered as directed, as claimed for it by the defendant. He prays that the articles be released to him, and further that the United States district attorney be enjoined from further levying upon or seizing any of the defendant's goods.

The plea of former judgment is denied, as "an essential element of the offense under this act is the state of mind of defendant, a factor necessarily subject to constant change. To contend that a prosecution or proceeding which turned not as most offenses do on the commission of the overt act, but on the state of mind of the defendant, would constitute a bar to a proceeding based upon the defendant's state of mind at a later date, is essentially unsound."

On the trial of the cause the Government produced an analysis of the contents of the medicine, showing its ingredients as found by the analyst. The defendant denied the correctness of the analysis, claiming that in addition to the ingredients ascertained by the chemist to be in the medicine, there was a further ingredient of sweet spirits of niter, and that in lieu of the spirits of turpentine, as declared by the chemist, the medicine in truth and in fact contained oil of juniper.

The Government made proof by physicians of standing in the community, both upon the nature and the character of the diseases claimed to be cured, and upon the medicinal properties and effects if any of the medicine itself upon such diseases.

The proof establishes very clearly to the mind of the court that there is no medicinal treatment which will aid or relieve cases of diabetes, and that no medicine has properties which will afford relief by dissolving gravel. On these two diseases, for which the carton claims curative properties in the medicine, there can be no shadow of doubt that the entire claim is false. The Government also proved beyond question that no single medicine or combination of medicine could be helpful for all of the various forms of diseases named on the carton, and that in that respect the claims of it are false.

The evidence further established that the general claim that the medicine had curative properties for kidney and bladder troubles, without limiting the claim to particular kinds of such troubles, made the claim embrace in it certain characters of kidney afflictions, which, under the admission of the defendant himself, the medicine did not have, and could not have any curative effects upon.

The evidence further established that while in some instances a weak or lame back might possibly have its origin or explanation in some derangement of the kidney or bladder, or more properly some disturbance there, that the vast majority of weak and lame backs are ascribable to constipation, to lumbago, and to various muscular conditions having no relation whatever to kidney or bladder troubles, making it clear that the claim of the medicine in the general terms as stated must necessarily be held to be false, since in the very nature of things it was not even claimed by its manufacturer and distributor that the medicine had properties to ease muscular affections. So that it is clear that the carton, as to its curative properties as to weak and lame backs, also is misbranded.

As to rheumatism, much evidence was offered upon the nature and cause of rheumatism, and while it seems clear that at one time rheumatism was associated with kidney troubles, it has now come to be recognized as a specific infection, in no manner related to the kidney and bladder, and it seems also clear as to rheumatism, that the language used in the carton constitutes a case of misbranding.

As to the final claim on the carton, that it regulates bladder trouble in children, the explanation made by the defendant of the scope of that claim, that it

does not stand before the court as a person who practices fraud upon the public for the purpose of vending a harmful and deleterious substance. The danger and injury to the public from this character of advertisement is, however, considerable, in that it induces persons to rely in serious cases, upon a preparation without healing virtue, when [but] for this reliance, they would no doubt secure proper advice and treatment for the ills which affect them.

Entertaining these views, it follows that the prayer of the libel for condemnation must be sustained, and a decree of forfeiture with costs entered, which decree of forfeiture may be, however, avoided by the claimant's paying all costs of this proceeding and making bond in the sum of $250 conditioned as by law, provided that the goods will not be used or handled in violation of law; or the intervenor and claimant may in lieu of bond deposit with the clerk of this court in cash the sum of $250, which said money shall be deposited on the same conditions as the conditions contained in the bond hereinbefore mentioned, and shall be held by the clerk to abide any further orders of this court to be made herein. A decree will therefore be entered in accordance herewith giving the intervenor and claimant, E. W. Hall, thirty (30) days after the final judgment in this case, within which to make his bond if he so desires, or deposit the cash as hereinbefore provided in lieu of bond, and it is directed that should the claimant and intervenor E. W. Hall not make a bond or deposit the cash, as herein provided, within the thirty (30) days allowed, that the 141 bottles of drug compound known as "Texas Wonder, Hall's Great Discovery" be destroyed. The costs of this proceeding are taxed against the claimant, E. W. Hall, and the Southern Drug Company.

Thereupon on July 21, 1919, a formal decree of condemnation and forfeiture was entered, and it was ordered by the court that the product might be released to said E. W. Hall, claimant, upon payment of the costs of the proceedings and the execution of a bond in the sum of $250, in conformity with section 10 of the act.

Thereupon the said claimant, by his attorney, in open court, duly excepted to said judgment of the court condemning and forfeiting the drug products and gave notice of an application for a writ of error for the Circuit Court of the Fifth Circuit. Thereafter the appeal of claimant having been perfected and the matter having come on for final disposition before the Circuit Court of Appeals, on July 16, 1920, the judgment of condemnation and forfeiture decreed by the lower court was affirmed, as will more fully appear from the following decision by the said Circuit Court of Appeals, before Walker, *Circuit Judge*, and Foster and Call, *District Judges*, Walker, *Circuit Judge*, delivering the opinion of the court:

This was a libel by the United States praying that one hundred and forty-one bottles, more or less, of described drug products or medicine be seized for condemnation, and be condemned, and sold or destroyed. The libel contained allegations to the following effect: Each bottle mentioned was encased by a carton with the following printing or label thereon, to wit:

"A Texas Wonder, Hall's Great Discovery, Contains 43% alcohol before diluted. 5% after diluted. The Texas Wonder! Hall's Great Discovery, for Kidney and Bladder Troubles, Diabetes, Weak and Lame Backs, Rheumatism, Gravel, Regulates Bladder Trouble in Children. One small bottle is 2 months' treatment. Price $1.25 per bottle. E. W. Hall, Sole Manufacturer, St. Louis, Mo."

There was enclosed in each of the cartons a circular containing the following: "Louis A. Portner * * * testified he began using the Texas Wonder for stone in the kidneys * * * and tuberculosis of the kidneys as diagnosed by his physicians * * *. He was still using the medicine with wonderful results, and his weight had increased."

That said label and the said carton, and the circular contained in each of said cartons, regarding the curative or therapeutic effect of the said drug or medicine are false and fraudulent, in that the said drug or medicine contains no ingredient or combination of ingredients capable of producing the curative or therapeutic effects claimed for it as set forth by the printed matter on said carton, and thereby the said products are misbranded in violation of paragraph 3 of section 8 of the Food and Drugs Act of June 30, 1906, and the amend-

ments thereof. Said bottles were shipped in interstate commerce in a way described, and, as a result of such shipment, were, at the time of the filing of the libel, in the possession of a named party in the district in which the proceeding was instituted. The plaintiff in error intervened, claimed the bottles proceeded against, and by answer put in issue material averments of the libel. Pursuant to a stipulation of the parties waiving a trial by jury, the case was tried by the court without the intervention of a jury. The court made findings of fact to the effect that the articles libeled were transported in interstate commerce in cartons labeled as alleged, that every claim made for the medicine on the carton was false, and that the medicine as compounded has not and could not have the curative properties claimed for it; that the defendant-intervener made the claims shown on the carton recklessly and without a sincere belief in their truth, and that he had actual knowledge that the claims as made were false; and that, in so far as the question of false and fraudulent misbranding is a question of fact, the medicine as distributed was misbranded falsely and fraudulently. Based upon such findings of fact the court concluded, as a matter of law, that the bottles of medicine libeled were falsely and fraudulently misbranded within the meaning of the statute, and because thereof were subject to forfeiture and condemnation. There was a judgment in pursuance of such findings of fact and conclusion of law. The case is here on exceptions to the last-mentioned action of the court, and to rulings on objections to evidence in the course of trial.

Counsel for plaintiff in error in argument made objection to the consideration by this court of the part of the opinion rendered in the case by the district judge, which was quoted in the brief filed by the counsel for the defendant in error. This objection is based, not on a claim that there was any inaccuracy in the quotation, but on the ground that the opinion of the trial judge is not properly a part of the record to be considered by this court. If a provision of a rule of this court (Rule XIV) had been complied with, a copy of that opinion would have been a part of the record before us. The objection on the ground stated is without merit. Certainly it is not an obstacle to a proper consideration of a case by an appellate court, for it to be authentically informed by an opinion of the trial judge of the manner in which the evidence adduced was considered by him and of the reasons relied on to support the conclusions he reached.

Language used in the label is to be given the meaning ordinarily conveyed by it to those to whom it was addressed. When so read and construed it amounted to an assertion that the article referred to, if used as directed, might be expected to have a curative or alleviating effect on the classes of ailments mentioned. There was no indication of an intention to except any ailment embraced in those classes. Evidence adduced showed what were the ingredients of the article called "A Texas Wonder," and that those ingredients could not, singly or in combination, have any remedial or beneficial effect on any ailment of the kinds mentioned in the label. The plaintiff in error, the claimant below, the manufacturer and distributor of the article, was a witness in his own behalf. Admissions made by him showed that he was fully aware that his product did not, and could not, have any remedial effect on certain well-known kinds of kidney trouble. Evidence disclosed that it was bought and used as a remedy for ailments as to which admittedly it was wholly ineffective. It can not with any plausibility be contended that there was an absence of evidence to support a finding that the plaintiff in error put the articles in question into the channels of interstate trade, labeled as a cure or remedy for stated classes of ailments, when he knew that it was ineffective as to an ailment or ailments embraced in those classes, and that this was done with actual intent to deceive buyers and users of the article. Such a finding was enough to support the further conclusion that the alleged label contained a statement as to the curative or therapeutic effect of the article referred to which was false and fraudulent within the meaning of the statute. (37 St. L., 416; Seven Cases *v.* United States, 239 U. S., 510.)

It is urged in argument that there should be a reversal because of the overruling of objections to the following questions propounded by the court to a physician who was a witness for the claimant:

"I will ask you whether or not such a combination as has been read to you as contained in this bottle is recognized by the medical profession generally, or any portion of it, as a specific for either kidney or bladder troubles, diabetes, weak and lame back, rheumatism or gravel?

"I will ask you whether any physician that you know of would advise, and I am not speaking with reference to any particular person, but whether the medical opinion crystallized by discussion and exchange of views, would recommend for treatment to a person afflicted with kidney trouble, as a great discovery or solvent of that trouble, this thing?

"Would it be considered good or bad practice for a physician to give it to a man from the standpoint of protecting a man's health?"

The asking of the first-quoted question was justifiable by the circumstance that the witness, at a preceding stage of his examination, had made a statement to the effect that the combination of ingredients which evidence had showed constituted the article in question would have a definite and specific effect on the various organs of the body. Certainly it was not improper for the court to seek to ascertain from the witness what he meant by that statement. The negative answer given by the witness to the question made it plain that he was not to be understood as asserting that the combination in question was regarded as a specific for the class of ailments for which the label suggested its use; in other words, that it was specially adapted to have a beneficial effect with reference to such ailments.

The action of the court in overruling objections to the other questions above set out was treated in argument in behalf of the plaintiff in error as showing or indicating that the case was tried on the erroneous theory that condemnation of the articles proceeded against could be based on opinions of physicians that those articles did not possess the remedial qualities claimed for them. That the court in asking the questions and in overruling objections to them was not influenced by any such erroneous theory is made plain by the opinion rendered. That opinion discloses that it was recognized that the condemnation sought could not be adjudged unless the evidence adduced proved, (1) that the label's statement in regard to curative or therapeutic effect was false, and (2) that such statement was fraudulently made. Falsity in the label's statement of remedial effect being one of the elements required to be proved, it was not improper to admit expert evidence on that issue. On such an issue the opinions of persons whose occupation, training, and experience are such as to make them acquainted with the qualities of the ingredients of the article in question is admissible. And it is permissible to prove that these comprising such a class generally regard the ingredients of an article in question as ineffective, singly or in combination, in the treatment of ailments mentioned, and would in practice refrain from using it in such treatment because of the recognized futility of doing so. It may be assumed that if the issues of fact had been tried by a jury the objections to one or more of the questions asked might properly have been sustained as a means of keeping the jury from being confused or misled into basing their verdict on legally insufficient evidence. But when the issues were tried by the court without a jury, and there was evidence tending to prove all that was required to be proved to support the judgment rendered, and findings were made in pursuance of such evidence, and it is disclosed that the court correctly apprehended what was required to be found to support its judgment, that judgment is not to be disturbed in the absence of the record clearly showing erroneous action prejudicially affecting the substantial rights of the party seeking a reversal.

The conclusion is that the record does not show any reversible error. The judgment is affirmed.

E. D. BALL, *Acting Secretary of Agriculture.*

8361. Adulteration and misbranding of Big G. U. S. * * * v. 5 Dozen Bottles of Big G. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 10212. I. S. No. 13354-r. S. No. E-1364.)

On May 5, 1919, the United States attorney for the Western District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 5 dozen bottles of a product, labeled in part "Big G A Non-poisonous Tonic, Antiseptic, Prepared by The Evans Chemical Co., Cincinnati, Ohio," remaining unsold in the original unbroken packages at Buffalo, N. Y., alleging that the article had been shipped on November 16, 1918, from the State of